Draft response from SCCCJ to the consultation on strengthening the presumption against the use of short custodial sentences

CONSULTATION QUESTIONS

Question 1: Should the presumption against short periods of imprisonment of three months or less be extended?

√ **Yes**
☐ **No**

You may wish to provide information to support your views, for example, what do you consider to be the key factors for or against the proposal?

Comments:

The long held concern over Scotland's high rate of imprisonment has been addressed by many commissions and reports, which are acknowledged in the consultation paper. Since the presumption against short sentences of up to 3 months was introduced in 2010, there has not been a significant change in sentencing practice, and there have been concerns of sentence inflation.

Effective community alternatives to custody and remand

Addressing the length of prison sentences, however laudable, is not something which can be done in isolation, because the issue is not what can we do to discourage inefficient use of the prison facility, it is what are we going to put in place which is better?

Sentence length or case seriousness?

The argument for reducing the prison population tends to be based not only on its relative ineffectiveness, compared to non-custodial sanctions in similar cases, but also based on a claim about proportionality: that imprisoning some people for some kinds of offences is unnecessary, disproportionate, and therefore a waste of money.

The view can be traced back at least as far as the 2008 Prison Commission report which argued for the reduction in the use of short prison sentences on grounds of proportionality and that prison should be reserved for those committing the most serious offences and those posing a risk of serious harm.

In other words, the real problem is not short-terms of imprisonment *per se*; rather, it seems that the presumption policy is using length of imprisonment as a *proxy* for those cases deemed less serious or posing a lesser risk of serious harm. However, length of sentence is a very crude proxy for seriousness of offending and risk of serious harm.

Arguably, it would be a more direct and clearer method to specify the kinds of

cases which, as a matter of proportionality, would be normally non-imprisonable. This is the sort of careful work which could be led by the Scottish Sentencing Council in drafting Sentencing Guidelines.

SCCCJ has published a report on short sentences at See http://www.scccj.org.uk/wp-content/uploads/2015/12/REPORT-ON-PASS-EVENT-SCCCJ_final.docx

Question 2: If you agree that the presumption against short periods of imprisonment should be extended, what do you think would be an appropriate length?

☐ **6 months**
☐ **9 months**
√ **12 months**

Comments:

To achieve a radical reduction in the use of custody for those committing less serious offences and posing less serious risk of harm, the presumption even if extended to 12 months is likely (at least in itself) to achieve little. There will need to be a much more radical approach from the Government (and the Sentencing Council).

Importantly, nothing much may change unless and until we *relinquish the mentality of custody as 'a last resort'*. Such thinking, as we have seen, in fact renders custody as the default, a back-up when 'alternatives' are seen to fail.

Instead, we need to *exclude* certain purposes (such as rehabilitation) as a ground of imprisonment, and begin careful work to specify certain kinds of cases as normally non-imprisonable.

Question 3: Do you have any specific concerns in relation to a proposed extension of the period covered by the presumption against short sentences?

Comments:

Credibility: why 'custody as the last resort' fails

That non-custodial sentences are not considered by sentencers (or others) as

credible, robust, visible, or immediate as imprisonment is hardly new. Indeed the dominant policy view that 'custody is a last resort' ends up meaning in practice that custody becomes the default. When other options don't seem to work, there is always prison. When one runs out of options, there is prison. The language of 'last resort' in effect renders prison as the default. All other options have to prove themselves to be 'appropriate' and if they fail to do so, there is always prison. Prison is guaranteed and seen as ever-reliable. While non-custodial sentences and social services seem so stretched, imprisonment, on the other hand, appears as the dependable, credible and well-resourced default. As one sheriff interviewee put it:

> " '*really when I'm imposing short [prison] sentences, that's when we've run out of ideas*!'"[1]

The language and mentality of custody as 'the last resort' is a central problem. We need to relinquish it. Little will change unless and until we invert that thinking by beginning to specify certain circumstances and purposes as normally non-imprisonable.

Imprisonment and Needs

In many instances prison is used not because of the seriousness of offending but because nothing else seems good enough. For instance, we are, as a society using imprisonment in part to access services for those who have not committed serious offences but are in desperate need of support and care. Many people end up in prison not because their offending is particularly serious, nor because they pose any significant risk of serious harm. They end up in prison because there does not appear to be anywhere else that can address their chronic physical, mental health, addiction and other personal and social needs. While non-custodial sentences and social services are so stretched, imprisonment, on the other hand, appears as the dependable, credible and well-resourced default.

The result is self-perpetuating: resources are sucked into the seemingly credible, robust and reliable option of imprisonment at the expense of community-based programmes which *appear as* weak, unreliable and poorly explained.

One cannot exactly blame individual judicial decision-makers for coming to the sincerely held judgement that the only way to address the needs as well as deeds of some individuals is to impose custody (whether through remand or through sentence) because the community based services are so stretched.

[1] Scottish Government (2015) *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences* p128

This phenomenon will become even more acute, unless action is taken to preclude it. Over the next few years we will see further deep cuts to community justice and indeed the very community services on which community justice relies. Meanwhile, prisons are better resourced than they were. Thankfully, prisons are not as degrading as they used to be and the regimes are more constructive. That is of course a good thing, but the unintended consequence of these two developments, (improving rehabilitation in prison combined with the perception of deteriorating community justice), is likely to be that more needy individuals who commit (or are accused of) relatively minor offences will end up in custody. One cannot necessarily blame individual judicial decision-makers, prosecutors, social workers for seeing custody as the only 'safe haven' for such individuals. Yet in policy terms it makes no sense and is a dreadful waste of resources.

A Public Principle about what Prison is Not for.

A way counteract this understandable (yet tragic) situation and preclude its likely to growth is to set out a public principle that no one should be sentenced to imprisonment for their own needs (or rehabilitation). The test for imprisonment should hinge on the seriousness of offending. Of course, if while in prison, serious offenders can be rehabilitated that is a good thing. But no one should go to prison for want of services in the community. Such a principle could be set out in a Sentencing Guideline judgement and also through guidance to social workers prosecutors.[2]

Electronically Monitored Bail

In terms of efforts to reduce the use of remand, electronically monitored bail should be revisited. It seems strange that we resort to custodial remand when EM is available as a means of control which is less stigmatising, allows the maintenance of relationships, employment, training, and is far less expensive.[3]

It is vital to increase the use and efficacy of community-based sentences

1. Community sentence options must be evaluated as excellent and efficacious and be replicable across the whole of Scotland. They must be well resourced so that sentencers have confidence in their use
2. We should not wait for a prison to close before resources are moved to community-based projects. The community justice options should be "front-loaded" with funding to get them up and running
3. We should look at setting up a pilot scheme to take remand and custodial

[2] This argument is put forward more fully at http://ow.ly/SQAEv

[3] Electronically Monitored Bail was introduced as a pilot in three areas in Scotland over ten years ago when its take up was very low (Barry, M., Malloch, M., Moodie, K., Nellis, M., Knapp, M., Romeo, R., & Dhanasiri, S. (2007) *An Evaluation of the Use of Electronic Monitoring as a Condition of Bail in Scotland*, Edinburgh: Scottish Executive Social Research). Arguably, with advances in technology it is time to look again at how it can be used to reduce the use of remand. See M Nellis ****

sentencing away from a summary court and put resources into community options –so that they are seen as the default
4. Community sentencing must be person centred and CJSW must be given more time and resources to tackle the underlying problems of offending and support someone on a path towards desistance.
5. We should look at successful international examples of community sentencing
6. We must work hard to change society's beliefs in community sentencing
7. Successful community projects could be extended to support people at the start of the offending process – not at the point where it has become very severe.
8. CJSW must be shown how best practice in bail supervision can be very useful in supporting people

Question 4: Do you think there are any specific circumstances to which a sentencing judge should be required to have regard when considering the imposition of a custodial sentence?

Comments:

Professor Alec Spencer has said "*We should not be imprisoning people with mental illness, those addicted to drugs and alcohol, the abused, the weak and vulnerable, and the incapable, for them the answer lies not in custody, but in reintegration and support in their community. Community services, housing associations, health services, education and training should all feature*."

Circumstances to which a sentencing judge should have regard in considering a custodial sentence is whether there is a public protection risk which demands a custodial sentence.

Using custody as a means of delivering rehabilitation services is not an appropriate alternative to ensuring that these needs are met in the community.

Rehabilitative services delivered in the community are more effective and cheaper than using short sentences.

Nowhere can this be more effectively seen than with the successful community based projects for female offenders such as Willow Services and the 218 project.

Rules 1&2 of the Bangkok rules state that:

"Rule 1

In order for the principle of non-discrimination, embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules. Providing for such needs in order to accomplish substantial gender equality shall

not be regarded as discriminatory.

2. Admission

Rule 2

1. Adequate attention shall be paid to the admission procedures for women and children, due to their particular vulnerability at this time. Newly arrived women prisoners shall be provided with facilities to contact their relatives; access to legal advice; information about prison rules and regulations, the prison regime and where to seek help when in need in a language that they understand; and, in the case of foreign nationals, access to consular representatives as well.

2. **Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children." (**own emphasis)

To quote Professor Andrew Coyle CMG, in a recent event on women affected by the criminal justice system:

"*The starting point for radical reform will not be found within the prison system, no matter how enlightened that may be. Consider the opening paragraph of the report of the Commission on Women Offenders, the Angiolini Report:*

Many women in the criminal justice system are frequent re-offenders with complex needs that relate to their social circumstances, previous histories of abuse and mental health and addiction problems.

Let us stand this statement on its head:

Many women with complex needs that relate to their social circumstances, previous histories of abuse and mental health and addiction problems end up in the criminal justice system and are frequent re-offenders."

He went on to say:

"The question which faces us today is whether the criminal justice system is best equipped to deal with all these complex needs relating to "social circumstances", previous history of abuse and mental health and addiction problems". The conclusion of the Commission on Women Offenders was quite clear. The solution to these problems lies beyond the criminal justice system in general and beyond the prison system in particular. The report of the Commission dealt first with alternatives to prosecution, then with alternatives to remand in custody and with sentencing issues before saying anything about imprisonment. Imprisonment, in other words, comes only at the end of a very long spectrum when all other alternatives have been exhausted."

For the full report see: http://www.scccj.org.uk/wp-content/uploads/2015/06/1st-

April-2015-Draft-report-on-women-and-justice-SCCCJ-SWGWO-event-FINAL.doc

1. We need to be clear on what prison is for and what it is not for.
2. Using short time periods as categories for sentencing is a blunt instrument. Many cases covered in summary courts may be violent ones and we need a level of proportionality to be levelled according to the type of crime, level of seriousness, level of violence etc.

Question 5: Do you think there are specific offences to which the presumption should not apply (i.e. offences which could still attract a short custodial sentence)?

Comments

There are no offences, in our opinion, which should attract a short custodial sentence.

Persistence and Breach

It is often noted that some individuals do not comply with community penalties and so custody must be the sanction to uphold the authority of the court's decision-making. This position is reasonable.

Yet, whether we sufficiently understand the journey away from offending is important here. The lessons from the (inaptly named) desistance approach are crucial: this shows us that the journey away from crime is far more contingent than we had previously realised. Offending is not something which can be switched off like a tap. Lapses and relapses are inevitable, and the confidence of the individual that decision-makers really want him/her to succeed is important.[4]

In this respect the increased use of review hearings (recommended by the Prison Commission and the Commission on Women Offenders) may be valuable. Such hearings can enable the judicial decision-maker and individual to build up a sense of mutual understanding and genuine respect so that neither sees the decisions of the other as arbitrary or dismissive. Currently, while the use of review hearings is permissible, they are conducted *in spite of* system incentives rather than because of them. Everyone has to get through their case load and the use of review hearings only adds to it.

Could Restriction of Liberty Orders be used instead of custody in the case of individuals deemed unwilling or unable to comply? Why does custody have to

[4] For a simple introduction to desistance, see for example, themed issue of *Scottish Justice Matters* 1(2) Dec 2013; and some of the policy implications are raised in a short paper by B Weaver and F McNeill (2007) *Giving up Crime: Directions for Policy* (SCCJR).

be seen as the 'ultimate sanction' in such cases? Can RLOs fill that space? Electronic monitoring should provide some assurance about control and if combined with human and humane social work support be a less damaging (and expensive) way of responding to breach?[5]

Question 6: Do you think that there are any circumstances in which a custodial sentence should never be considered?

Comments:

As stated previously, The test for imprisonment should hinge on the seriousness of offending. Of course, if while in prison, serious offenders can be rehabilitated that is a good thing. But no one should go to prison for want of services in the community. Such a principle could be set out in a Sentencing Guideline judgement and also through guidance to social workers prosecutors.

As previously mentioned, people should not be sent to custody to access health services – these must be delivered in the community.

Also as previously stated, the Bangkok rules on **Treatment of Women Prisoners and Non-custodial Measures for Women Offenders** state (rule 2, part 2):

"Prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children."

Also

"III. Non-custodial measures

Rule 57

The provisions of the Tokyo Rules shall guide the development and implementation of appropriate responses to women offenders. Gender-specific options for diversionary measures and pretrial and sentencing alternatives shall be developed within Member States' legal systems, taking account of the history of victimization of many women offenders and their caretaking responsibilities.

[5] Curiously, the CJ&L 2010 Act did not provide for the combination of EM with CPOs. See further Graham and McIvor (2015) *Scottish and International Review of the Uses of Electronic Monitoring* SCCJR and more generally Nellis, M. (2014a) 'Penal Innovation and the Imaginative Neglect of Electronic Monitoring in Scotland' *The Scottish Journal of Criminal Justice Studies* 20: 14-38.

Rule 58

Taking into account the provisions of rule 2.3 of the Tokyo Rules, **women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pretrial and sentencing alternatives, shall be implemented wherever appropriate and possible."** (own emphasis)

Question 7: Do you think that the Scottish Government should also consider legislative mechanisms to direct the use of remand? If so, do you have any views on what such a legislative mechanism might include?

Comments

Yes. We need primary legislation to bring in new laws surrounding the use of remand – we must make it happen

The issue of remand must also not be forgotten as a key driver in the rise of the prison population in recent years. The number of individuals on remand has increased by 65% since 2000 (951 in 2000 to 1565 in 2015); Remand prisoners constitute one fifth of the prison population in Scotland and Scotland's remand imprisonment rate is the highest of the UK jurisdictions. There are reports that the 140 day rules is being regularly flouted – this may be contributing to the increased use of remand (although and FOI request by Scottish Legal News to SCTS did not receive a full response). In 2012 / 2013, more people went to prison to await trial or sentencing than to be punished – there were 19,175 remand receptions and 14,668 sentenced receptions

The effective use of bail supervision, supervised electronic monitoring and other community based programmes must be considered. The confidence in the success of supervised bail and sufficient funding for such programmes is vital.

However, the use of bail supervision varies widely across Scotland. In 2012 / 2013, the community justice authority areas with the top 3 highest levels of requests from court for bail were Glasgow, North Strathclyde and Lanarkshire respectively. These three CJA areas received a total of 5,810 requests from court for bail (the total for the whole of Scotland was 6,874). These three CJA areas placed just 46 individuals on supervised bail. **Thus the 3 CJA areas with 84% of all the requests for bail in Scotland applied bail supervision to just 0.8% of the requests they received.**
In 2012 /2013 the remaining community justice authority areas placed 354 individuals on bail supervision from a total 1,074 requests from court for bail (approx. 33% bail supervision rate).

This wide disparity in the use of supervised bail must be overcome. Approximately 1500 individuals are on remand in Scottish prisons today. Based on a cost per prisoner place of £37k*, remand is costing the system around £55m per annum. The unit cost of supervised bail, on the other hand, is £3k. We must , secure better funding, resourcing and changes in attitude in the use of supervised bail.

*http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Publications/costcrimjustscot/costcrimjustdataset

Scottish Prison Service, Source SPS accounts 2013-14. The cost of a prisoner place is £37,059 this is a rolling 3 year average of the average cost per prisoner place, calculated on a resource accounting basis (including depreciation and impairment charges). A 3 year rolling average is presented to smooth the effects of including impairment charges which can significantly affect the value of a single year's average cost of a prison place).

In England and Wales, the use of the no real prospect clause in the Bail Act has led to a decrease in the number of people on bail.

We urge the Scottish Government to bring in similar legislation so that if there is no real prospect of a conviction in a non-serious, non-violent crime then that person should not be placed on remand, but offered alternatives such as supervised bail.

We also urge the Scottish Government to consider the Bangkok rules which state that: “women should not be remanded if they have a family to care for in Scotland there is a high level of women being held on remand who do not go on to custody.”

Amy legislation on remand should not only look at the reasons for its use and the community alternatives, but also consider a wide range of factors to support people away from an offending pathway

- Prevention
- Diversion & alternatives to prosecution
- Family and caring responsibilities
- Mental health status
- Other health issues such as addiction
- Will remand render the individual homeless and with benefit sanctions? The creation of homelessness and poverty should be avoided

Question 8: Do you have any additional comments on the use of short-term imprisonment?

Comments

SCCCJ has published its report on this issue at:

http://www.scccj.org.uk/wp-content/uploads/2015/12/REPORT-ON-PASS-EVENT-

SCCCJ_final.docx

In essence we believe that short term imprisonment has not been shown to be of use in offender rehabilitation nor in supporting them on their pathway to desistance.

Sentencers must be allowed the option of nationwide, excellently resourced and well-funded community programmes that they can then build into CPOs. This should help both the individual and their community.

The voice of victims must be heard in this debate. Some victims may want the option of restorative justice and the Scottish Government must be mindful of ensuring that it meets the European Directive on victims' rights fully.

The seriousness of the crime should be the main driver for imposing a custodial sentence. Custody must not be used as a way of deriving rehabilitation or health services for an individual –these must be delivered in the community. There is quite a different group of crimes coming to the summary courts and other crime categories are increasing in number (knife crime, housebreaking, domestic violence, hate crime). All serious crime should go to the solemn court and less serious crime to the summary courts and summary courts should not be allowed to impose a custodial sentence.

It is vital to monitor how all the up-coming changes in legislation to justice will affect each other, so that we can mitigate for unintended consequences. For example, the Criminal Justice (Scotland) Bill and the Community Empowerment Act (2015), should be monitored to ensure that they work in synergy and that there are no conflicts leading to unintended consequences.

It is vital to have an approach of "Getting It Right For Every Offender" – which can be supported by CJSW, communities and all other agencies in the criminal justice system.

Other issues include:

1. "Wilful non-compliance" should be further investigated as this could be undiagnosed **oppositional defiance disorder**. This disorder can be supported if someone is given a full diagnosis
2. We need to understand the reasons for breach. In recovery from addiction it is expected that people will "fall off the wagon" and we should have the same level of understanding for breach of certain offending behaviour.
3. We must look at reasons for non-compliance of orders and community health projects (e.g. the Willow service) are successful at doing this and should be better resourced to support more women
4. Procurators have to look at bail from the perspective of community safety rather than whether someone will receive a custodial sentence. We hope that a new policy to give the police more time to put a case together so more

people should be placed on bail for further reports will held to reduce the level of people held on remand – but we must monitor this

5. CJScotland, which will be created by the community justice bill, does not have the power to ensure resources are transferred to the correct sector / project – this is a problem
6. The community justice bill has a very aspirational model for community planning partnerships – the efficacy of CPPs is not based on concrete evidence and they must be evaluated closely, particularly in looking at how the health needs of vulnerable offenders are addressed
7. We must look at previous successful schemes for electronic monitoring – as the cost of using the technology reduces we may be able to implement these
8. Community health and education programmes must be increased – people should not have to commit a crime before they receive treatment
9. The best way to save money in the CJ system is by closing prisons. Barlinnie prison is due to be rebuilt to the cost in excess of £150 million. If we significantly reduce the remand population and increase diversion programmes we could look at not building such an expensive replacement. If we had fully implemented the Angiolini recommendations over the past few years, we could have closed Cornton Vale by now.